FILED
OCT 5 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965.

No. [redacted] 13

EDWARD J. GARRITY and EDWARD VIRTUE,
Appellants,

vs.

STATE OF NEW JERSEY, *Appellee.*

JAMES HOLROYD, EUGENE D. ELWELL
and DONALD MURRAY, *Appellants,*

vs.

STATE OF NEW JERSEY, *Appellee.*

Criminal Action.

Appeal from the Supreme Court of New Jersey.

MOTION TO DISMISS.

NORMAN HEINE,
Prosecutor, Camden County,
New Jersey,
Attorney for Appellee, State of
New Jersey,
Court House,
Camden, New Jersey.

JAMES G. AIKEN,
Assistant Prosecutor,
On the Brief.

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

TABLE OF CONTENTS

	PAGE
Motion to Dismiss	2
Opinions Below	2
Statute Involved	3
Questions Presented	5
Statement of the Case	6
Argument	7
I. There is no substantial federal question. Appellants have no standing to question the constitutionality of a statute, N. J. S. 2A:81-17.1, which was not invoked with respect to them	7
II. There is no substantial federal question. There is no basic constitutional right to public employment, and, therefore, it is reasonable for a state to require, in exchange for the privilege of governmental employment, that a given employee relinquish a given right, that of freedom from self-incrimination, in a given situation, that is, in an official investigation of his conduct in his official capacity in a particular job	10
Conclusion	17

TABLE OF CITATIONS

CASES: PAGE

Adler v. Board of Education, 342 U. S. 485, 72 S. Ct. 380, 95 L. Ed. 517 (1952) 10

Bailey v. Richardson, 182 F. 2d 46 (D. C. Cir. 1950) ..10, 11

Barrows v. Jackson, 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953) 9

Griswold v. State of Connecticut, U. S. , 85 S. Ct. 1678, L. Ed. 2d (1965) 9

Konigsberg v. State Bar of Cal., 366 U. S. 36, 81 S. Ct. 997, 6 L. Ed. 105 (1961) 12, 13

Mapp v. Ohio, 367 U. S. 643, 657, 81 S. Ct. 1684, 1692, 6 L. Ed. 2d 1081 (1961) 14

Meyer v. State of Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) 10

NAACP v. Button, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) 10

NAACP v. State of Alabama, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) 10

Parker v. County of Los Angeles, 338 U. S. 327, 333, 70 S. Ct. 161, 163, 94 L. Ed. 144 (1949) 8

Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) 9

Poe v. Ullman, 367 U. S. 497, 503, 81 S. Ct. 1752, 1755, 6 L. Ed. 2d 989 (1961), rehearing denied, 368 U. S. 869, 82 S. Ct. 21, 7 L. Ed. 2d 69 (1961) 8

State v. Naglee, 44 N. J. 209, 223 (1965) 7, 11

Tileston v. Ullman, 318 U. S. 44, 63 S. Ct. 493, 87 L. Ed. 603 (1943) 8, 9

PAGE

Traux v. Raich, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915) 9

United Public Workers of America (C. I. O.) v. Mitchell, 330 U. S. 75, 88, 67 S. Ct. 556, 564, 91 L. Ed. 754 (1947) 8

STATUTES:

N. J. S. 2A:81-17.1 .....3, 5, 6, 7, 14

N. J. S. 2A:81-17.2 .....4, 6, 14

CONSTITUTION:

Article III, United States Constitution 7

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 386.

EDWARD J. GARRITY AND EDWARD VIRTUE,
Appellants,

VS.

STATE OF NEW JERSEY,
Appellee.

JAMES HOLROYD, EUGENE D. ELWELL AND DONALD MURRAY,
Appellants,

VS.

STATE OF NEW JERSEY,
Appellee.

CRIMINAL ACTION.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

MOTION TO DISMISS.

Pursuant to Rule 16(b) of this Court, Norman Heine, Prosecutor, Camden County, New Jersey, on behalf of the State of New Jersey, moves to dismiss and/or affirm on the grounds that the question presented is so unsubstantial as not to warrant further argument.

OPINIONS BELOW.

The opinions from which Appellants appeal to this Court are: That of the Supreme Court of New Jersey, entered March 1, 1965, reported in 44 N. J. 209, 207 A. 2d 689 (1965) which is contained in Appendix A of Appellants' Jurisdictional Statement; and that of the Supreme Court of New Jersey, entered March 15, 1965, reported in 44 N. J. 259, 208 A. 2d 146 (1965), which is contained in Appendix B of Appellants' Jurisdictional Statement.

STATUTE INVOLVED.

Official citation: Session Law 1953, Chapter 259, Page 1759, Section 1 and cited as New Jersey Statutes (N. J. S.) 2A:81-17.1:

> "Any person holding or who has held any elective or appointive public office, position or employment (whether State, county or municipal), who refuses to testify upon matters relating to the office, position or employment in any criminal proceedings wherein he is a defendant or is called as a witness on behalf of the prosecution, upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this State which has the right to inquire under oath upon matters relating to the office, position or employment of such person or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself, shall, if holding elective or public office, position or employment, be removed therefrom or shall thereby forfeit his office, position or employment and any vested or future right or tenure or pension granted to him by any law of this State provided the inquiry relates to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for election or appointment to any public office, position or employment in the State."

Official citation: Session Law 1953, Chapter 259, Page 1760, Section 2 and cited as New Jersey Statutes (N. J. S.) 2A:81-17.2:

> If any person shall have forfeited his office by reason of the provisions of section one of this act a proceeding may be instituted hereunder in the Superior Court by any citizen who is a resident of this State by proceeding in lieu of prerogative writ. The court shall hear and determine the same without a jury unless such person shall within ten days after the institution of such proceedings demand a trial by jury. L. 1953, c. 259, p. 1760, §2.

QUESTIONS PRESENTED.

1. Do appellants have standing to question the constitutionality of a statute, N. J. S. 2A:81-17.1, which was not invoked with respect to them?

2. If there is no basic right to public employment, is it reasonable for a State to require, in exchange for the privilege of governmental employment, that a given employee relinquish a given right, that of freedom from self-incrimination, in a given situation, that is, in an official investigation of his conduct in his official capacity in a particular job?

STATEMENT OF THE CASE.

The statements of appellants Garrity and Virtue taken by Deputy Attorney General Rigg were not taken in the presence of the said appellants' attorney but they, the appellants, indicated that they had made arrangements for counsel but did not believe it necessary for counsel to be present.

The statements of appellants Holroyd, Elwell and Murray taken by Deputy Attorney General Rigg were actually taken in the presence of their attorney, John F. Gerry, Esq., a member of the New Jersey Bar.

At no time since the institution of these proceedings have any of the appellants invoked or attempted to invoke the provisions of N. J. S. 2A:81-17.2.

At no time did Assistant Prosecutor Kaplan refer to N. J. S. 2A:81-17.1 in connection with the statements taken from all the appellants by him.

At no time during any proceedings did any of the appellants present or offer to present any evidence that any reference to or the existence of N. J. S. 2A:81-17.1 had any effect on or overbore their will or free and voluntary choice in making the statements in question.

Appellants have brought no proceedings under N. J. S. 2A:81-17.2.

ARGUMENT.

I. There is no substantial federal question. Appellants have no standing to question the constitutionality of a statute, N. J. S. 2A:81-17.1, which was not invoked with respect to them.

Appellants do not have standing to attack the constitutionality of N. J. S. 2A:81-17.1 because this statute was never invoked with respect to them. Article III of the United States Constitution requires that there must be a case or controversy in order for this Court to entertain jurisdiction.

In reality, appellants seek to have the Court determine whether or not their constitutional rights would have been infringed if the statute had been invoked. This point is clear from the opinion of the New Jersey Supreme Court in *State v. Naglee*, 44 N. J. 209, 223 (1965), where the Court said:

> "As we have mentioned earlier in this opinion, Mr. Rigg did not expressly threaten to invoke the sanction of the statute against the defendants Garrity and Virtue. The warning he gave them was to the effect that if they did not cooperate in the investigation they might be subject to dismissal as a result of a subsequent proceeding. We determined that such a dismissal would be proper even in the absence of a statute. Therefore, we conclude that the defendants, in the circumstances of this case, are not in a position to challenge the constitutionality of the statute."

Thus, appellants are questioning the New Jersey Supreme Court's interpretation of the facts as established in the pre-

vious appeal. In order to have standing, appellants should have allowed the statute to be invoked in a subsequent proceeding and then questioned the constitutionality thereof.

In *Poe v. Ullman*, 367 U. S. 497, 503, 81 S. Ct. 1752, 1755, 6 L. Ed. 2d 989 (1961), rehearing denied, 368 U. S. 869, 82 S. Ct. 21, 7 L. Ed. 2d 69 (1961), the Court commented on the fact that within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed which make resolution of the controverted issue a practical necessity.

The Court went on to say at 81 S. Ct. 1756, that the best teaching of the Court's experience is not to entertain constitutional questions in advance of the strictest necessity. *Parker v. County of Los Angeles*, 338 U. S. 327, 333, 70 S. Ct. 161, 163, 94 L. Ed. 144 (1949).

In *Poe*, appellants sought to have the Court resolve the constitutionality of the Connecticut birth control statute. This suit was dismissed because the appellants lacked standing to present such a suit. Appellants alleged that appellee Ullman threatened to prosecute them for use of or for giving advice concerning contraceptive devices. The allegation was that in the course of his public duty he intended to prosecute any offenses against the Connecticut law. The Court citing *United Public Workers of America (C. I. O.) v. Mitchell*, 330 U. S. 75, 88, 67 S. Ct. 556, 564, 91 L. Ed. 754 (1947), said at 1754:

> ". . . The lack of immediacy of the threat described by these allegations might alone raise serious questions of non-justiciability of appellants' claims."

Prior to *Poe*, this statute had been brought to the Court in a case in which the plaintiff, seeking to represent others, asked for a declaratory judgment. *Tileston v. Ullman*, 318

U. S. 44, 63 S. Ct. 493, 87 L. Ed. 603 (1943). At that time the Court did not decide the question.

At a later date, the constitutionality of this same Connecticut statute was decided by the Court. *Griswold v. State of Connecticut,* U. S. , 85 S. Ct. 1678, L. Ed. 2d (1965). At this time appellants had adequate standing; the statute had actually been invoked against them.

The case *sub judice* is directly analogous to both *Poe* and *Tileston.* Appellants are asking the Court for a declaratory judgment; they are seeking to represent others against whom the statute might be invoked. It is clear that the Court will not entertain such a case. *Barrows v. Jackson,* 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953). In *Barrows* the Court made its position clear when it said at 1035:

> "There are still other cases in which the Court has held that even though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed. *Bode v. Barrett,* 344 U. S. 583, 585, 73 S. Ct. 468, 470; *Jeffry Mfg. Co. v. Blagg,* 235 U. S. 571, 576, 35 S. Ct. 167, 169, 59 L. Ed. 364; *People of the State of New York ex rel. Hatch v. Reardon,* 204 U. S. 152, 160-161, 27 S. Ct. 188, 190, 51 L. Ed. 415."

The case *sub judice* is unlike those in which the appellants were in a position to assert their rights. For example, *Traux v. Raich,* 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915), in which an employee was permitted to assert the rights of his employer; *Pierce v. Society of Sisters,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), where the owners of private schools were entitled to assert the rights of potential pupils and their parents; *Barrows v. Jackson, supra,* where a white

defendant party to a racially restrictive covenant, who was being sued for damages by the covenantors because she had conveyed her property to Negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection, although no Negro was party to the suit, and *NAACP v. State of Alabama*, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), where disclosure of membership lists of a constitutionally valid association was invalid as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. See also *Meyer v. State of Nebraska*, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Adler v. Board of Education*, 342 U. S. 485, 72 S. Ct. 380, 95 L. Ed. 517 (1952); *NAACP v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). The case *sub judice* presents a mere possibility in the remote future that appellants might be harmed if the statute in question were invoked; the appeal is premature.

II. There is no substantial federal question. There is no basic constitutional right to public employment, and, therefore, it is reasonable for a state to require, in exchange for the privilege of governmental employment, that a given employee relinquish a given right, that of freedom from self-incrimination, in a given situation, that is, in an official investigation of his conduct in his official capacity in a particular job.

There is no basic right to government employment. *Bailey v. Richardson*, 182 F. 2d 46 (D. C. Cir. 1950), was a suit for a declaratory judgment and an order for reinstatement of plaintiff in the employ of the federal government. The Court held that the President of the United States, in absence of congressional restriction, may remove from gov-

ernment service any person of whose loyalty he is not convinced. In *Bailey*, at page 57, the Court discussed the application of the Fifth Amendment to the situation at hand and said that it has been repeatedly held that government employ is not property and that in this particular case it is not a contract; in terms, the Due Process Clause does not apply to the holding of a government office. The Court went on to say that no function is more completely internal to a branch of government than the selection and retention or dismissal of its employees; so it has been held many times that the power of removal is an incident of the power of appointment. The Court concluded its discussion of this aspect of the law by saying on page 60:

> "But there is no basic right to government employ, any more than there is to employment by any other particular employer."

Since there is no right to government employment, a public official cannot assert that it is unreasonable for him to give up certain rights as a prerequisite to his employment. One who accepts public employment must necessarily give up certain rights as a prerequisite to the holding of such employment.

The New Jersey Court clearly explained the situation with which we are now dealing when it said in *State v. Naglee, supra*, at 221:

> "As policemen, Garrity and Virtue held sensitive positions in regard to reporting and prosecuting violations of the law. Surely, a police officer who refuses to cooperate in a proper investigation of his official conduct is acting inconsistently with his police duties. He is therefore properly subject to subsequent dismissal proceedings. *Fallon v. New Orleans Police Department*, 238 La. 531, 115 So. 2d 844 (Sup. Ct. 1959); *Fichera v.*

State Personnel Board, 217 Cal. App. 2d 613, 32 Cal. Rptr. 159, 163 (D. Ct. App. 1963); see also *Canteline v. McClellan*, 282 N. Y. 166, 25 N. E. 2d 972 (Ct. App. 1940); *Souder v. Philadelphia*, 305 Pa. 1, 156 A. 245, 77 A. L. R. 10 (Sup. Ct. 1931); *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 248 (Ct. App. 1907). The obligation to cooperate does not depend on the existence of a statute or rule. It is intrinsic to a police officer. *Christal v. Police Comm. of San Francisco*, 33 Cal. App. 2d 564, 92 P. 2d 416 (Sup. Ct. 1939). See also *Drury v. Hurley*, 339 Ill. App. 33, 88 N. E. 2d 728 (Sup. Ct. 1949); and *In re Emmons*, 63 N. J. Super. 136 (App. Div. 1960). It is to be noted that the above cases recognize the right of a policeman to assert his privilege against self-incrimination; but he may be discharged for doing so. A subsequent discharge is not predicated upon an inference of guilt from the police officer's refusal to testify, but upon his failure to cooperate in a situation where his duty compels cooperation. See the discussion in *Ratner, 'Consequences of Exercising the Privilege Against Self-Incrimination,'* 24 U. Chi. L. Rev. 472, 503-504 (1957)."

It necessarily follows that a person who accepts a position of public or governmental employment, such as that of a police officer, must give up certain rights as a prerequisite to or consequence of such employment. Among these is the right to be free from self-incrimination in an inquiry pertaining to his official conduct.

An analogous situation is presented in *Konigsberg v. State Bar of Cal.*, 366 U. S. 36, 81 S. Ct. 997, 6 L. Ed. 105 (1961), where the Court said that the Fourteenth Amendment's protection against arbitrary State action does not forbid a State from denying to the appellant admission to the Bar so long as he refuses to provide unprivileged answers to questions having substantial relevance to his quali-

fications. The Court explained its theory of law at 366 U. S. 44-45, where it said:

> "An investigation of this character, like a civil suit, requires procedural as well as substantive rules. It is surely not doubtful that a State could validly adopt an administrative rule analogous to Rule 37(b) of the Federal Rules of Civil Procedure which provides that refusal, after due warning, to answer relevant questions may result in 'the matters regarding which the questions were asked' being considered for the purpose of the proceeding to be answered in a way unfavorable to the refusing party, or even that such refusal may result in 'dismissing the action or proceeding' of the party asking affirmative relief."

The fact that the *Konigsberg* case was concerned with questions pertaining to communist affiliations is not dispositive of the issue. It is not the subject matter of the questions which is important, but rather the fact that those who fail to cooperate in certain inquiries must necessarily face the consequences. Where the information is relevant to one's qualifications or one's official conduct, the right of the State to have this information is paramount to the right of the individual against self-incrimination. As the Court said in *Konigsberg* at 366 U. S. 51:

> "Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved."

The Fifth Amendment of the United States Constitution, along with the Fourth Amendment, dictates that citizens have a right to freedom from unconscionable invasions of

privacy. *Mapp v. Ohio*, 367 U. S. 643, 657, 81 S. Ct. 1684, 1692, 6 L. Ed. 2d 1081 (1961). The right against self-incrimination is one of these private rights; that is, a right which may be asserted by a person in his individual capacity. This right should not be interpreted as one which may be asserted by a person in his official capacity in order to keep hidden any misconduct, misfeasance or non-feasance, with respect to the performance of his duties. It is, in effect, a synthesis of the antithesis of the democratic form of government to allow a public official to conduct himself improperly and then to afford the people no opportunity to make inquiry and no recourse to such conduct. It is the duty of a policeman to cooperate in any investigation of police activity. Therefore, it is a reasonable requirement that a given employee forego a given constitutional right as a condition of employment.

There is very little legislative history on the bill from which N. J. S. 2A:81-17.1 and 17.2 evolved. There is no hearing report on the bill and no reference to it in the Rutgers Law Review or the New Jersey Law Journal. Included at the end of the Assembly Bill is the following statement:

> "In his annual message to the Legislature on January 13, 1953, Governor Driscoll stated: 'During recent years, we have witnessed the undefying spectacle of officials who refuse to testify when called before public investigatory bodies. The practice has been common in Washington; it is not unknown elsewhere in the nation. The constitutional privilege against self-incrimination has been used to keep from the public information of the most vital concern and which it has every right to have. This privilege has been invoked by those who have held public office while unfaithful to their trust, irresponsible in action, corrupt or disloyal. There is no

logic in permitting a public official or employee who so refuses to testify to continue to exercise the powers and advantages of his office. I strongly recommend legislative action which will forfeit the office or position, tenure and pension rights of any such person'."

At the end of the Senate Bill, the following statement appears:

"It is proposed by this bill to remove the impediment to investigation which is contained in constitutional provisions protecting the privilege against self-incrimination. It would penalize any person who refuses to testify upon matters relating to his office on the ground that his answer might tend to incriminate him by requiring that he forfeit his office and be prohibited from holding other office for a period of five years. The bill which was first developed by the Chicago Crime Commission is aimed at strengthening the prosecution in criminal cases. Reports of several recent investigations have recommended enactment of this type of legislation, including the report of the U. S. Senate Committee on the District of Columbia in 1952.

It is felt by many that the passage by State legislatures of this bill or a similar one would result not only in expediting criminal investigations but also in attracting to office officials with a high standard of integrity and public duty. It is felt, moreover, that it would tend to eliminate from public office those individuals whose only desire for public office is to abuse the trust by participating in practices which cannot stand the light of public exposure.

It has been argued that the bill in effect nullifies the constitutional protection against self-incrimination for the public officials involved. They may exercise their

privilege, but to do so involves the loss of their primary livelihood. It can be said, however, that the bill will not deprive any person of his constitutional right to refuse to testify, but does provide that no person serving the public can hide his criminality behind that privilege and still hold public office. An official may assert his constitutional right, but he has no constitutional right to hold his office."

Reference to an act of this type appeared in Suggested State Legislation, 1953, of the Council of State Governments, at page 10. The statement reads as follows:

"An Act Relating to Testimony of Public Officials Regarding Conduct in Office."

"This measure which was carried in the 1951 Program of Suggested State Legislation, would penalize any public official who refuses to testify on matters relating to his office on the ground that his answer might tend to incriminate him, by requiring that he forfeit his office and be prohibited from holding other office for a period of five years."

It is apparent from the above statements that the reason for enacting such legislation was to benefit the public in general and guarantee that elected and appointed officials would not use the Fifth Amendment to cover any indiscretion or misfeasance in office. Based on the proposition that the citizens of New Jersey have a right to honest and efficient government, this statute was enacted to insure that there would be total cooperation in any criminal investigation which might take place. Thus, one may assume that the Legislature was of the opinion that the right against self-incrimination was a private right and that it ought not to apply to a public official with respect to his conduct while acting in his official capacity.

In conclusion, although there is little legislative history on this statute, the statements following the bills make clear the point that the statute is a reasonable exercise of the power of the Legislature to insure efficient and proper conduct of public officials. There is no right to governmental employment, and thus it is reasonable to require that public officials give up this constitutional right for the purposes of any official investigation into the performance of official duties.

CONCLUSION.

Appellants have raised no substantial federal questions which warrant further attention of this Court and, therefore, it is respectfully urged that the instant appeal be dismissed, or in the alternative, that the judgment of the New Jersey Supreme Court be affirmed.

Respectfully submitted,

NORMAN HEINE,
Prosecutor, Camden County,
New Jersey,
Attorney for Appellee,
State of New Jersey.